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Regulation of the Labor Relations of Multinational Enterprises: A Comparative Analysis and a Proposal for NLRA Reform

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NOTES AND COMMENTS

Regulation of the Labor Relations of Multinational Enterprises: A Comparative Analysis and a Proposal for NLRA Reform

I. INTRODUCTION

The rapid expansion of the multinational enterprise (MNE) to a position of dominance in world trade is probably the major development in the post-World War II international economy. The MNE is one of the most controversial economic and political entities of the modern world. Its effect on trade and investment patterns is hotly debated in home and host countries alike.

While the political and economic consequences of the tremendous growth of multinationals have been discussed widely, their impact on the work forces of the affected countries has received much less critical analysis. Specifically, the effects that MNEs have on jobs, income, unionism and other labor related issues only now are being subjected to intensive study.¹

It is the purpose of this Comment to examine some of the legal problems created by MNEs with regard to labor relations. Particular emphasis will be placed on national efforts designed to regulate the labor relations activities of multinationals and a proposal for reform of the National Labor Relations Act (NLRA) will be advanced. Initially this study will discuss the nature of union-management dynamics in the transnational setting. After briefly viewing the

1. See generally C. F. BERGSTEN, T. HORST & T. H. MORAN, *AMERICAN MULTINATIONALS AND AMERICAN INTERESTS* 99-120 (1978) [hereinafter cited as *AMERICAN MULTINATIONALS*]; Kujawa, *U.S. Labor, Multinational Enterprise and the National Interest: A Proposal for Labor Law Reform*, 10 *LAW & POL'Y INT'L BUS.* 941 (1978) [hereinafter cited as Kujawa]; 1 U.S. DEPT OF COMMERCE, *THE MULTINATIONAL CORPORATION: STUDIES ON U.S. FOREIGN INVESTMENT* (1972); U.S. TARIFF COMM'N, 93D CONG., 1ST SESS., *REPORT TO THE SENATE COMM. ON FINANCE AND ITS INT'L TRADE SUBCOMM., IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR* (Comm. Print 1973). Several of the books which have dealt with the subject are the products of symposia. *BARGAINING WITHOUT BORDERS: THE MULTINATIONAL CORPORATION AND INTERNATIONAL LABOR RELATIONS* (R. J. Flanagan & A. R. Weber eds. 1974); *AMERICAN LABOR AND THE MULTINATIONAL CORPORATION* (D. Kujawa ed. 1973); *TRANSNATIONAL INDUSTRIAL RELATIONS* (H. Gunter ed. 1972).

options available to labor to combat the inherent inequality of bargaining power between national unions and large MNEs, it will examine national efforts in the Federal Republic of Germany and Sweden which attempt to remedy or ameliorate this inequality. This will be followed by a discussion of multilateral and international efforts undertaken by the European Communities, the Organization for Economic Cooperation and Development and the United Nations. Finally, this Comment will examine the American legal framework of labor relations between unions and MNEs. It will conclude with proposed amendments to the National Labor Relations Act which would remedy the presently existing power imbalance.

The author contends that reforms of the NLRA which countervail the bargaining advantage MNEs have over national unions are necessary, partly to introduce a new concept and partly to overcome judicial and administrative interpretations of the Act. Three changes are needed: 1) an amendment to § 8(d) to make employee representation in management a mandatory subject of bargaining; 2) an extension of the subject matter jurisdiction of the Act to its full reach under the Commerce Clause through an amendment to § 2(6); and 3) removal of the present protection MNEs enjoy from the secondary boycott prohibitions of the Act by amending § 8(b)(4)(B).

II. THE PROBLEM PRESENTED: INEQUALITY OF POWER BETWEEN MNEs AND NATIONAL LABOR UNIONS

A. *Dynamics of Labor-Management Relations in the Transnational Setting*

If there existed no great disequilibrium between the economic weaponry available to MNEs and that at the disposal of labor, then no serious labor relations problems would exist. A balance of power promotes concessions by both sides; the forces of collective bargaining would prevent the disproportionate gain of one necessarily to the disadvantage of the other. The MNEs are in a much stronger position by virtue of their size, resources and, most especially, their multinational character. As a result, national unions feel that they are on the defensive and seek assistance from government to aid them in their struggles against the multinationals.

This inequality of bargaining power arises chiefly from the nature of the multinational enterprise. The MNE is a coherent organization with a narrow and specific range of economic motivations; it is a formidably swift and effective machine.² As a result of its size and the fact that it operates within several national jurisdictions, the MNE is able to minimize or avoid some of the controls and checks and balances that have evolved within the national

2. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 756 (1969-1970) [hereinafter cited as Vagts]; see generally R. VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971). In comparing MNEs to nation-states, Professor Vagts made the following observations:

frameworks of the various countries in which it operates.³ MNEs can maximize their advantages among different national jurisdictions regarding such vitally important factors as fiscal and labor market conditions. By intra-corporate accounting devices such as transfer pricing, the MNE can determine where to show profits thereby avoiding tax liability.⁴ All these manipulations may adversely affect the national union member.

The ability of multinational firms to deal from a position of strength with labor unions arises more directly out of their size and scope. MNEs are able to break strikes by shifting production among their various subsidiaries in different countries in a way that minimizes disruptions in the overall production system and maintains service to the market affected by the industrial dispute.⁵ A firm could also "run away" from or permanently reduce operations in areas

(1) the MNE has a structure and orientation which allow it to develop a strategy that is more nearly global in viewpoint than that of any previous business entity - that is, one which pays less heed to national frontiers in pursuit of its objectives; (2) the MNE's emphasis on technology makes it both a formidable competitor or antagonist and a highly desirable guest; and (3) the MNE is a large scale enterprise with many readily available resources and frequently a commanding market position.

Vagts, *supra*, at 756-57. The same factors which give MNEs an advantage over nations give them the same advantages over national unions.

3. Cox, *Labor and the Multinationals*, 54 FOREIGN AFF. 344, 353 (1976) [hereinafter cited as Cox]; see AMERICAN MULTINATIONALS, *supra* note 1, at 100-01.

4. Cox, *supra* note 3, at 353; Comment, *National Labor Unions v. Multinational Companies: The Dilemma of Unequal Bargaining Power*, 11 COLUM. J. TRANSNAT'L L. 124, 125 (1972) [hereinafter cited as *NLU v. MNC*]; Rose, *The Rewarding Strategies of Multinationalism*, FORTUNE, Sept. 15, 1968, at 100, 101. See I.R.C. § 462 for the U.S. legislative response to the problem of taxation in the face of transfer pricing within MNEs.

5. Blake, *Trade Unions and the Challenge of the Multinational Corporation*, 403 ANNALS 34, 36-37 (1972) [hereinafter cited as Blake]; see Cox, *supra* note 3, at 353. But see Shearer, *Fact and Fiction Concerning Multinational Labor Relations*, 10 VAND. J. TRANSNAT'L L. 51, 55-56 (1977) [hereinafter cited as Shearer], who argues that the transfer of operations overseas to combat strikes is illusory because of the high costs involved in such transfers; and who contends that the use of imports to maintain domestic sales in the face of a strike, while a real potential threat, is a politically unacceptable weapon because it would lead to adverse reactions both by other unions and by lawmakers which could lead to changes in trade legislation to prevent such strike-breaking techniques. Accord Kujawa, *supra* note 1, at 949; Gould, *Multinational Corporations and Multinational Unions: Myths, Reality and Law*, 10 INT'L LAW. 655, 659-61 (1976) [hereinafter cited as Gould]; Int'l Labour Office, *Industrial Relations in a Multinational Framework*, 107 INT'L LAB. REV. 496 (1973).

It is not so important, however, whether MNEs frequently engage in these activities or not; the feasibility of their use combined with a belief by union leaders that they do occur leads to the same result: an inequality of bargaining power. See Address by George Ball, Columbia Law School (Feb. 26, 1976), reprinted in Conference on the Regulation of Transnat'l Corps., The Friedman Series in Int'l Law, Columbia Law School 44, 49 (1976) (limited circulation in Harvard Law School Int'l Legal Studies Library). Based on an exhaustive analysis of the relevant data, a Brookings Institution study concludes that:

Though it is doubtful that multinational enterprises export significant numbers of jobs from the United States or adversely affect labor's share of American income distribution, some jobs are exported . . . and the position of labor in collective bargaining is weakened by the multinationalization of business. In addition, labor's belief,

of high costs or adverse labor conditions through changes in its patterns of investment, production and organization.⁶

As long as different countries maintain sharply different policies and as long as labor conditions vary from jurisdiction to jurisdiction, the MNEs undoubtedly will continue their attempts to take advantage of the climate most favorable to them. The sophisticated and centralized information and decision-making systems available to and utilized by the MNEs allow these firms to actively and aggressively exploit their advantages over both national governments and national unions so as to force the latter into a defensive posture.⁷

The principal weaknesses of unions in confronting the MNEs are readily apparent and easily catalogued. Labor is generally well-organized and well-paid in the industrialized home countries of MNEs, whereas it is docile and cheap in developing host countries.⁸ This may be a major incentive for MNE location in a particular host country.⁹ The lack of union power there makes it difficult or impossible to initiate coordinated labor policies in both countries. Further, differences in labor ideologies and politics, especially noticeable between unions in the U.S. and Europe, make concerted action difficult.¹⁰

whether well-founded or not, that jobs are exported has led it to search for effective means to countervail the perceived power of multinational enterprises.

AMERICAN MULTINATIONALS, *supra* note 1, at 110; *accord* Kujawa, *supra* note 1, at 946. For an enlightening discussion of the views of the AFL-CIO, see the entire issue of VIEWPOINT, Fourth Quarter 1975 (see especially *Take the Money and Run*, *id.*, at 2, 6-8).

6. *NLU v. MNC*, *supra* note 4, at 125. For example, Chrysler Corporation considered disposing of its United Kingdom subsidiary, Chrysler U.K. Ltd., in late 1975 partly because of labor problems. *Wall St. J.*, Oct. 30, 1975, at 4, col. 2. Later that same year, the large British automaker, British Leyland, announced plans to liquidate its Italian subsidiary, Leyland Innocenti, because of labor problems. *Id.*, Nov. 28, 1975, at 4, col. 5. A recent example of "runaway" operations are those engaged in by American automakers and electronics companies in Mexico. These firms ship parts from American manufacturing plants just across the border to Juarez where they are assembled as finished products by low-paid Mexican workers. The products are then shipped back to the U.S. Crucial to the success of these manipulations are the import duties charged by both nations. Because the MNEs are providing much needed employment, the Mexican Government exempts the imported parts from duties; and the U.S. taxes only the value added upon reshipment to America. It is thus cheaper to pay the low Mexican wages and the import duties on the products assembled in Mexico than it is to pay U.S. workers to do the assembly. *N.Y. Times*, Feb. 7, 1979, § D, at 1, col. 1; see *Wall St. J.*, Feb. 29, 1979, at 32, col. 3.

7. Cox, *supra* note 3, at 353-54; see note 5 *supra*.

8. Cox, *supra* note 3, at 354. This is especially true in labor intensive industries, such as textile manufacturing, light fabricating and assembly business. Hildebrand, *Multinational Corporations: Their General Significance and Their Relation to Home Employment*, in *THE ECONOMIC EFFECTS OF MULTINATIONAL CORPORATIONS* 17, 21 (Michigan Business Papers No. 61, W. Sichel ed. 1975) [hereinafter cited as Hildebrand].

9. Cox, *supra* note 3, at 354; see Blake, *International Labor and the Regulation of Multinational Corporations: Proposals and Prospects*, 11 *SAN DIEGO L. REV.* 179, 188 (1973) [hereinafter cited as Blake, *International Labor*].

10. Cox, *supra* note 3, at 354. Also, the varying objectives of labor in developed and develop-

Finally, a labor organization is inherently different from an MNE; it is not as amenable to centralized control and decision-making because conflicting interest groups within the union must be dealt with and satisfied. Without the swiftness of action and centralization of authority of the MNE, the union cannot act quickly and effectively to counter hostile actions by the firms.

In short, the evidence supports the conclusion that bargaining power has shifted decisively in favor of the MNEs.¹¹ Unions have responded with counter-strategies to remedy this imbalance.

B. *Union Strategies Designed to Combat the Power of MNEs*

Unions have searched for effective means to countervail the power of MNEs to remedy the perceived and actual export of jobs and weakened position of labor in collective bargaining. Union efforts have followed two broad strategies: 1) the reduction of the mobility of the multinationals; and 2) the increase of the ability of labor to counter that mobility. Tactically, labor can pursue these strategies either internationally or nationally, the former by coordinating their activities with foreign labor groups, the latter by enlisting governmental support for their objectives.¹²

1. Multinational Unions and Transnational Bargaining

Labor's transnational efforts to overcome its weaknesses *vis-à-vis* the MNEs have included support for union organization abroad, political pressure on recalcitrant foreign governments and efforts to develop a common ideological framework to promote cooperation between labor organizations in different countries.¹³ Future industrial relations are envisioned here as gradually developing to the point where multinational unions are able to deal with global corporations from a position of relative strength and parity. Since space limitations preclude an in-depth discussion of the relative merits and

ing countries may be large deterrents. According to B. C. Roberts and Jonathan May, "conflicts of interest between unions in home and host countries of multinational enterprises . . . at bottom are probably the main obstacle to effective international union collaboration." Roberts & May, *The Response of Multinational Enterprises to International Trade Union Pressures*, 12 BRIT. J. INDUS. REL. 403, 416 (1974).

11. Kujawa, *supra* note 1, at 953.

12. AMERICAN MULTINATIONALS, *supra* note 1 at 110; Cox, *supra* note 3, at 353-59.

13. Cox, *supra* note 3, at 353-54. Transnational bargaining, its attendant strategies and legal ramifications are outside the scope of this Comment. For a discussion thereof see Kujawa, *supra* note 1, at 956-62; Murphy, *Multinational Corporations and Free Coordinated Bargaining: An Alternative to Protectionism?*, 28 LAB. L.J. 619 (1977); Shearer, *supra* note 5; Note, *Multinational Collective Bargaining - Myth or Reality?*, 9 VAND. J. TRANSNAT'L L. 101 (1976); Leonard, *Coordinated Bargaining with Multinational Firms by American Labor Unions*, 25 LAB. L.J. 746 (1974); Seham, *Transnational Labor Relations: The First Steps Are Being Taken*, 6 LAW & POL'Y INT'L BUS. 337 (1974); Blake, *supra* note 5. See, e.g., N.Y. Times, Jan. 17, 1979, § A, at 7, col. 4; *id.*, Nov. 20, 1978, § A, at 10, col. 3; cf. Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 CORNELL L. REV. 897 (1969).

strategies involved in transnational bargaining, the foregoing is mentioned merely to indicate one possible labor strategy in dealing with MNEs. Suffice it to say that, among major American labor organizations, only the U.A.W. actively supports this strategy.¹⁴

2. Increased Home and Host Country Control Over MNEs

Juxtaposed to the transnational efforts of unions to meet the transnational challenge of the corporations is a strategy that calls for increased political pressure by unions in home and host countries. The aim here is to enact local controls that eliminate the advantages enjoyed by MNEs because of their multinational character.¹⁵ Although confined within the borders of a single State, national unions would not be disadvantaged in their dealings with MNEs if national governments enacted and enforced laws to prevent abuse of the unequal bargaining situation.¹⁶ These efforts to employ local law in attempting to control the labor relations activities of the multinational firms have been undertaken in various jurisdictions. They are advocated by most labor organizations, including the AFL-CIO.¹⁷

III. ANALYSIS OF NATIONAL AND MULTINATIONAL EFFORTS AT COUNTERVAILING THE POWER OF MNEs

A. *National Efforts*

1. The Federal Republic of Germany

In Western Europe, labor participation on corporate boards has been advanced as an effective means of responding to the challenges posed by existing labor-management relations. Prominent among the proposed reforms is the system of employee codetermination (*Mitbestimmung*), established in West Germany just after World War II, which provides for the election of employee directors to a specified number of seats on corporate boards. Although not directed specifically at MNEs, codetermination has large implications for multinationals doing business in Germany.

The underpinnings of employee participation in Germany have their origins in the early 1900s.¹⁸ Although provisions appear in statutes as early as

14. Cox, *supra* note 3, at 354-55. For a discussion of various European, Asian and some American efforts in this regard, see AMERICAN MULTINATIONALS, *supra* note 1, at 113-18.

15. Cox, *supra* note 3, at 355.

16. *NLU v. MNC*, *supra* note 4, at 126; AMERICAN MULTINATIONALS, *supra* note 1, at 119; see § III.A *infra*.

17. Cox, *supra* note 3, at 355; see § V.A *infra*.

18. For a discussion of the history of codetermination in Germany, see Vorbrugg, *Labor Participation in German Companies and Its European Context*, 11 INT'L LAW. 249 (1977); Gruson &

1919,¹⁹ codetermination in modern West Germany did not become firmly entrenched until 1951. The Codetermination Act of 1951 (*Montanmitbestimmungsgesetz*)²⁰ provides for equal employee-shareholder representation on the supervisory boards²¹ of corporations in the coal and steel industries; it was later extended to include coal and steel holding companies.²² A less radical form of codetermination for all stock corporations outside coal and steel was inaugurated a year later. The 1952 Works Constitution Law (*Betriebsverfassungsgesetz*)²³ allocated one-third of the seats on the supervisory boards of these corporations to employee representatives.²⁴

Responding to increased union pressure over the next twenty years to end the disparity between the coal and steel companies and the rest of West German corporations, a new, more extensive codetermination law was passed in 1976.²⁵ This legislation ostensibly extends fifty-fifty representation to most types of West German industry;²⁶ however, due to various provisions²⁷ the shareholders have majority control. Even though the workers have not achieved true parity representation, unions have gained the power to genuinely influence the direction of German industry.²⁸

Meilicke, *The New Co-Determination Law in Germany*, 32 BUS. LAW. 571 (1977); Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. LEGIS. 947, 949-52 (1977) [hereinafter cited as Note, *Employee Codetermination*]; Meissel & Fogel, *Co-Determination in Germany: Labor's Participation in Management*, 9 INT'L LAW. 182 (1975).

19. Law of March 23, 1919, § 2, [1919] Reichsgesetzblatt [RGBI] I 343 (Ger.); Law of April 24, 1919, art. 1(1), [1919] RGBI I 413 (Ger.); Law of Feb. 4, 1920, [1920] RGBI I 147 (Ger.); Law of Feb. 15, 1922, §§ 3, 4, [1922] RGBI I 209 (Ger.).

20. Law of May 21, 1951, [1951] Bundesgesetzblatt [BGBI] I 347 (W. Ger.).

21. German corporations are governed by a two-tier system of directors. The supervisory board (*Aufsichtsrat*) decides basic issues of corporate policy and oversees corporate operations. A management board (*Vorstand*), appointed by the supervisory board, is in charge of the day-to-day operation of the corporation. Note, *Employee Codetermination*, *supra* note 18, at 952 n.10. German codetermination involves the placing of employee representatives on the supervisory board.

22. Law of Aug. 7, 1956, [1956] BGBI I 707 (W. Ger.).

23. Law of Oct. 11, 1952, §§ 76-77, [1952] BGBI I 681 (W. Ger.). The codetermination provisions exempt family-run businesses employing less than 500 persons. *Id.* §§ 76(6), 77(1).

24. *Id.* § 76(1).

25. Law of May 4, 1976, [1976] BGBI I 1153 (W. Ger.) [hereinafter cited as New Law]. For an English translation of the law see P. PELTZER, *MITBESTIMMUNGSGESETZ/CO-DETERMINATION LAW* (1976). For an in-depth discussion of the provisions and effects of the New Law, see the authorities cited in note 18 *supra*; Fabricus, *The New German Codetermination Law*, 1977 J. BUS. L. 101; Rittner, *A New Constitution for German Big Business: The Co-Determination Act 1976*, 1 HASTINGS INT'L & COMP. L. REV. 113 (1977).

26. New Law, *supra* note 25, § 1.

27. *E.g.*, the chairman of the board, who has two votes in order to break a tie, New Law, *supra* note 25, § 29(2), is elected by a two-thirds majority when no candidate succeeds after two ballots. *Id.* § 27(2). The shareholders thus have a *de facto* right to elect the chairman.

28. *E.g.*, labor has a powerful voice in the selection of management board members because appointments thereto must be approved by a two-thirds majority of the supervisory board; in the event no such vote is achieved a mediation board composed of equal numbers of labor and shareholder representatives nominate candidates who are then elected by a simple majority. New Law, *supra* note 25, § 31.

The implications of this new law for MNEs is clear. Through labor representation on the supervisory boards of multinationals in Germany, employees have acquired access to important information about corporate operations and have achieved a measure of control over corporate policy at the highest levels.²⁹ Thus a union in West Germany can successfully countervail the power of the multinational through the exercise of the power codetermination has given them. The German arm of the multinational is no longer a pawn subject to the absolute commands of the central MNE decision-makers. Despite the fact that at least one respected international law scholar considers the new law to be a violation of the Treaty of Friendship, Commerce and Navigation between the U.S. and West Germany³⁰ as it applies to subsidiaries of American MNEs,³¹ it appears that codetermination is well established in West Germany³² and that it has emerged as an effective method of local control over the operations of MNEs within a single country.

2. Sweden

Sweden is one home country which has made a major effort to check the activities of its locally based multinationals in host countries through national legislation. It has enacted two laws dealing directly with MNEs. Swedish legislation authorizing government insurance for foreign direct investment in developing countries requires that the insured firm meet specific national

29. See A. STURMTHAL, *COMPARATIVE LABOR MOVEMENTS* 65-69 (1972).

30. Oct. 29, 1954, Federal Republic of Germany — United States, arts. V(1), (3)-(5), VII(1), (4), [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593.

31. Professor Wengler in *Parity Codetermination in West German Companies and International Law*, 9 VAND. J. TRANSNAT'L L. 1, 39 (1976), comments:

1. The right of American shareholders in companies of the Federal Republic to demand that members of the supervisory board continue to be elected under the regulations hitherto in force is a property right protected against encroachment by the German-American Commercial Treaty of 1954, especially in light of its most-favored-nation clause and in light of other treaties for the protection of investments which the Federal Republic has concluded with third countries.

2. The introduction of parity codetermination would be an encroachment on the rights of American shareholders in violation of the Treaty.

32. There had been some doubt as to the constitutionality of the New Law. Business opponents charged that the parity requirement violated Articles 14 and 9(3) of the German Constitution. GRUNDGESETZ arts. 14, 9(3) (W. Ger.). Article 14 is similar to the Fifth Amendment of the U.S. Constitution because it proscribes government interference in property rights without justification in the public interest. Article 9(3) guarantees persons the right to organize for economic benefit. But doubt as to the validity of the law was ended recently by a decision of the West German Supreme Court. In the Judgment of Mar. 1, 1979, Bundesverfassungsgericht, W. Ger., N. Y. Times, Mar. 2, 1979, § D, at 11, col. 4, the court unanimously ruled that the New Law is consistent with both the Grundgesetz and basic statutes governing companies, shareholders and coalitions of employers. James Furlong, commenting on this decision in *The Wall Street Journal*, considers it to be a favorable holding which "is likely to have profound domestic consequences and produce a substantial ripple effect abroad." Furlong, *Manager's Journal: Workers in the Board Room*, Wall St. J., Mar. 12, 1979, at 18, col. 3 [hereinafter cited as Furlong].

standards in such matters as collective bargaining rights, compensation for wage losses during illnesses, injuries and layoffs, pensions and several other health and welfare matters.³³ This law is designed to help workers in host countries, rather than those in Sweden, on matters of interest common to both. The effectiveness of the legislation is questionable, however, since no Swedish firm has ever used the insurance; they ignore the insurance program rather than meet its conditions.³⁴

The ability of Swedish labor to deal directly with multinationals has been increased by another law. In 1974, amendments to legislation on capital movements were passed to require Central Bank approval of all capital outflows for foreign direct investment by Swedish-based firms.³⁵ All corporate applications for such permission must be accompanied by statements on the proposed investment from both blue-collar and white-collar unions.³⁶ The remedial effect of this law also is unknown at present. As of February 1979, no applications have been denied and it is too early to determine how much Swedish labor will gain from this opportunity.³⁷

Sweden also has adopted a system of employee codetermination similar to that of Germany. A provisional statute which took effect in 1973 provided for the direct election of two employee representatives and two alternates to the board³⁸ of any company with a work force of 100 or more.³⁹ After the expira-

33. Law of July 17, 1968, [1968] Sverges Författningssamling [SFS] 447 (Swed.) (Social Conditions Attached to the Swedish Investment Guarantee Scheme), translated in part in Blake, *International Labor*, *supra* note 9, at 192-95; AMERICAN MULTINATIONALS, *supra* note 1, at 112. Such legislation is very similar to that in the United States which created the Overseas Private Investment Corporation (OPIC). 22 U.S.C. §§ 2191-2200a (1976). The purpose of OPIC is "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objectives of the United States. . . ." 22 U.S.C. § 2191 (1976), as amended by Overseas Private Investment Corporation Amendments Act of 1978, Pub. L. No. 95-268, § 2, 92 Stat. 213.

34. AMERICAN MULTINATIONALS, *supra* note 1, at 112; Letter from Professor Gunnar Hedlund, Stockholm School of Economics, Institute of International Business, to author (Feb. 23, 1979) [hereinafter cited as Letter from Professor Hedlund] (copy available in the *Boston College International and Comparative Law Review* offices).

35. Law of June 18, 1974, [1974] SFS 458 (Swed.) (amending Law of June 22, 1939, [1939] SFS 350 (Swed.), and Law of June 5, 1959, [1959] SFS 264 (Swed.)) [hereinafter cited as 1974 Law]. See *The Economist*, April 13, 1974, at 10, col. 1.

36. 1974 Law, *supra* note 35.

37. The 1974 Law requires the foreign exchange board of the Swedish Central Bank (*Sveriges Riksbank*) to assess the consequences for employment and industrial structure in Sweden of transfers of capital. The board, on which union representatives sit, has been liberal so far; but union representatives are said to have veto power in practice, if not formally. Letter from Professor Hedlund, *supra* note 34, at 2, see also AMERICAN MULTINATIONALS, *supra* note 1, at 113.

38. Swedish corporations have a unitary board of directors system, ordinarily employing three executive and three non-executive members, excluding worker representatives. Note, *Employee Codetermination*, *supra* note 18, at 977 n.94.

39. Law of Dec. 28, 1972, [1972] SFS 829 (Swed.). For a full explanation and critique of the

tion of this experimental law, a permanent statute was passed in 1976 which expanded the same representation requirements to all companies with twenty-five or more employees.⁴⁰ The role of the employee-director is made explicit in this law, whereas in the German legislation the role is less clearly delineated. An employee-director acts in the same capacity as other board members, except that he may not be a part of discussions or decisions concerning labor negotiations, collective bargaining agreement terminations, strikes and other conflict of interest situations.⁴¹ Thus, while allowing an effective representation of the employee viewpoint, the legislation avoids awkward and dangerous conflict of interest actions by labor directors.

Further legislation was enacted to expand the scope of codetermination even more.⁴² This law broadly provides that individual companies and their unions must collectively negotiate rules with respect to all policies which may have an impact upon working conditions.⁴³ As a result, Swedish-based employers are required to negotiate with unions before they can order production changes, invest in new facilities, acquire other companies, or adopt any other measures which could affect plant employment.⁴⁴

The implications of the new laws for Swedish multinationals and foreign MNEs doing business in Sweden are great. While not focused directly at MNEs, these worker participation statutes may prove to be as, if not more, effective weapons in the hands of labor than the foreign direct investment laws designed specifically to countervail the power of the MNEs. As is true with the German system, because decision-making is no longer exclusively in the hands of corporate shareholder management and because employees now have access to important information about corporate operations, the power imbalance caused by the multinational scope of MNE operations has been nearly equalized.

law, see Note, *Employee Codetermination*, *supra* note 18, at 976-79; L. FORSEBÄCK, INDUSTRIAL RELATIONS AND EMPLOYMENT IN SWEDEN 55 (1976); Gorton, *Employee Participation in Swedish Company Law*, 1975 J. BUS. L. 163; Gärde, *Co-Determination in Sweden: Functions for Boards with Employee Representatives*, 8 INT'L LAW. 344 (1974).

40. Law of June 3, 1976, [1976] SFS 351 (Swed.). The alternate employee directors are entitled to attend and speak at all meetings, but cannot vote when the employee directors are in attendance. *Id.* § 15. The presence of these alternates tends to reduce the isolation of labor representatives, particularly on larger boards. At least one employee director has the right to attend any executive committee meetings. *Id.* § 16. This prevents circumvention of the codetermination law through the establishment of subcommittees composed solely of shareholder directors to carry on the business of the board.

41. *Id.* §§ 8, 17.

42. Law of June 10, 1976, [1976] SFS 580 (Swed.); see Wall St. J., June 4, 1976, at 6, col. 3.

43. Law of June 10, 1976, § 32, [1976] SFS 580 (Swed.).

44. See Wall St. J., June 4, 1976, at 6, col. 3; *Worker Participation Becomes Law*, BUSINESS WEEK, June 21, 1976, at 42.

B. *Multinational and International Efforts*

Primary responsibility for regulation of labor relations must rest with individual States because industrial relations is an area of vital local concern. It is true, however, that many measures designed to control the activities of MNEs in the employment field will be ineffective or frustrated unless they are accompanied by action at the multinational or international level which promotes cooperation and harmonization. To this end the European Communities (EC),⁴⁵ the Organization for Economic Cooperation and Development (OECD)⁴⁶ and the United Nations have developed programs and proposals.

1. European Communities

The EC in recent years has drafted two proposals to harmonize Community law to ensure worker participation in management. One goal, as in Sweden and Germany, is to place reins on corporate activity which is adverse to unions.

In an attempt to standardize corporate structure throughout the Community, the Executive Commission of the EC has drafted a proposed directive (Fifth Draft Directive) under which all member States would adopt the German two-tier board system for corporations with 500 or more employees.⁴⁷ Employee representation on supervisory boards is assured and two methods are provided to achieve this representation. Under the first, a minimum of one-third of the members of the supervisory board would be appointed by the workers or their representatives.⁴⁸ Under the second, the workers would have an input into the selection of each supervisory board member.⁴⁹

Another major proposal is the creation of Community-wide corporations.⁵⁰ Enfranchised to operate under a single legal framework throughout the EC,

45. The European Community was established by the Treaty of Rome, Mar. 25, 1957, [1958] 295 U.N.T.S. 2.

46. The OECD was established by the Convention on the Organization for Economic Cooperation and Development, Dec. 4, 1960, [1961] 12 U.S.T. 1728, T.I.A.S. No. 4891.

47. Comm'n of the European Communities, Proposed Fifth Draft Directive Concerning the Structure of Sociétés Anonymes and the Powers and Obligations of Their Organs, art. 2, 15 O. J. EUR. COMM. (No. C 131) 49 (1972), [1979] 1 COMM. MKT. REP. (CCH) ¶ 1401 [hereinafter cited as Fifth Draft Directive].

48. *Id.*, art. 4(2), [1979] 1 COMM. MKT. REP. (CCH) ¶ 1401B; see Malawer, *Labor Law in the Common Market — Worker Participation and Other Recent Developments*, 11 NEW ENG. L. REV. 55, 65 (1975) [hereinafter cited as Malawer].

49. Fifth Draft Directive, *supra* note 47, art. 4(3), [1979] 1 COMM. MKT. REP. (CCH) ¶ 1401B; see Malawer, *supra* note 48, at 66.

50. Comm'n of the European Communities, Proposal for a Council Regulation on the Statute for European Companies, BULL. EUR. COMMUNITIES, Supp. 4/75 (1975) [hereinafter cited as Statute]; see Malawer, *supra* note 48, at 57-58.

these "*Société Européennes*" or S.E.s would be required to adopt a two-tiered management hierarchy.⁵¹ The supervisory board would be divided into thirds, including an equal number of representatives of shareholders, employees and independent "general interests."⁵²

If adopted both these proposals would go a long way towards controlling the activities of MNEs throughout the EC. The first would simply extend the German-Swedish system of codetermination to each individual State in the Community. Such a harmonization of laws is favorable because codetermination appears to be an effective method of local control over MNEs. The second plan is more ambitious as it is intended to allow unions to operate transnationally on a par with business enterprises which do so. Although the basic premise of codetermination is the same, the Statute for European Companies would foster a few big unions to countervail the power of the few big MNEs, whereas the Fifth Draft Directive would strengthen the present multitude of national unions to regulate the activities of the local subsidiaries of the MNEs. Either method appears to offer an effective means of control over the labor relations-related activities of MNEs.

2. Organization for Economic Cooperation and Development

While the EC was developing plans for codetermination in Community corporations, the OECD adopted guidelines of conduct for multinationals operating within member countries.⁵³ These guidelines are merely recommendations jointly addressed by OECD members to MNEs operating in their territories; they are voluntary and not legally enforceable,⁵⁴ except to the extent individual States treat them as such with implementing legislation.

Regarding the equalization of union-management power, the guidelines advocate disclosure of relevant information by MNEs⁵⁵ as well as consultation between the MNEs, unions and government over management decisions which would adversely affect employment.⁵⁶ In addition MNEs are prohibited

51. Statute, *supra* note 50, art. 73; see Malawer, *supra* note 48, at 67.

52. Statute, *supra* note 50, art. 74a(1), as amended by Comm'n of the European Communities, Information Memo No. P-24, The European Company Statute Amendments, [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9745; see Malawer, *supra* note 48, at 69.

53. OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, OECD Doc. 21(76)04/1, Annex, Guidelines for Multinational Enterprises 11-17 (1976) [hereinafter cited as Guidelines].

54. *Id.* at 12, ¶ 6. But it is argued that the guidelines impose *de facto* obligations on MNEs. The reasons advanced for this conclusion are: 1) a desire on the part of MNEs to cultivate good public and governmental relations; and 2) since the guidelines are proclaimed to embody standards of good conduct universally recognized among Western industrial countries, they may be indicative of the future trend of international law. Plaine, *The OECD Guidelines for Multinational Enterprises*, 11 INT'L LAW. 339, 343-46 (1977).

55. Guidelines, *supra* note 53, at 16, ¶¶ 2(b), 3.

56. *Id.* at 17, ¶ 6.

from threatening to transfer production in order to gain concessions from labor during negotiations or organizing drives.⁵⁷

The major drawback of these proposals is their nonbinding status. Without a legally enforceable obligation, there is little to entice MNEs to comply, especially where their own self-interests are at variance to the guidelines. The specific provisions regarding disclosure and consultation may prove to be adequate counterbalances to the transnational power of MNEs if they were mandatory; but to request the multinationals to comply voluntarily when to do so would infringe on corporate policy and adversely affect profits is too much to expect. These weaknesses would be mitigated if individual governments adopted the proposals as law or regulation. Therefore the member countries of the OECD should agree jointly to enact the guidelines into law, and give them the comprehensive mandatory character necessary for their successful implementation.

3. United Nations

Recognizing that the absence of an international forum makes it difficult to achieve agreement on international regulation of MNEs,⁵⁸ a Group of Eminent Persons (Group)⁵⁹ submitted a report on multinational corporations to the Secretary-General of the U.N. which recommended that both a commission on multinational corporations and a center on information and research be established under the U.N. Economic and Social Council.⁶⁰ The purposes of these bodies are to investigate and study the operations and impacts of multinationals and recommend programs designed to deal with the problems discovered.

In the field of employment and labor, the Group felt that consideration should be given to ways of concerting national action at the international level in order to render it more effective. Specifically, it was recommended that the proposed commission on MNEs "study the various forms and procedures that could be evolved to ensure the protection of workers and their unions in the decision-making process of multinational corporations at the local and international level."⁶¹ This proposal is the same in spirit as European codetermina-

57. *Id.* at 17, ¶ 8. See Int'l Labour Org., Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ¶ 52 (Nov. 16, 1977) [hereinafter cited as ILO Declaration], reprinted in 17 INT'L LEGAL MAT'LS 422, 429 (1978), which also advocates that MNEs not threaten to transfer production to influence collective bargaining negotiations.

58. Report of the Group of Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations 51, U.N. Doc. E/5500/Rev. 1, ST/ESA/6 (1973) [hereinafter cited as Report].

59. The Group of Eminent Persons was established as a result of a recommendation from the U.N. Economic and Social Council (E.S.C.) to the Secretary General. E.S.C. Res. 1721, 53 U.N. ESCOR, Supp. (No. 1), U.N. Doc. E/5209 (1972).

60. Report, *supra* note 58, at 52.

61. *Id.* at 77.

tion, but lacks the mandatory participation of labor in company management. The Group also suggested that home and host countries permit free entry to unionists from other countries, thereby facilitating international coordination of labor comparable to that of the MNE.⁶² This tactic is advocated by the proponents of transnational unionism as well.⁶³

A further recommendation of the Group is similar to one of the OECD guidelines, *i.e.*, to enact international standards of disclosure, accounting and reporting to allow for the dissemination of data which are of special relevance in collective bargaining.⁶⁴ Such standards would tend to equalize the bargaining positions of labor and management because unions would be much more knowledgeable about the worldwide operations and fiscal health of the MNEs than they are at present. The final recommendation was designed to encourage coordinated activity by national unions against MNEs. It calls for national governments to adopt liberal policies regarding the use of sympathy strikes or other peaceful forms of concerted action by labor.⁶⁵ This recommendation is identical to efforts made within the U.S. to legitimize presently unlawful labor weapons against MNEs.⁶⁶

The commission and the center proposed by the Group of Eminent Persons were established by resolution of the U.N. Economic and Social Council.⁶⁷ As a heterogeneous international body, any recommendations the Commission on Transnational Corporations makes would be less likely to achieve full acceptance than would those of a homogeneous body, such as the EC or OECD. But one advantage it has over a regional group is the benefit of the information and research conducted by the Centre on Transnational Corporations on a permanent and on-going basis.⁶⁸

Among its various responsibilities, the Commission has assigned priority to the drafting of a code of conduct for MNEs.⁶⁹ A code is considered essential

62. *Id.*

63. See authorities cited at note 13 *supra*.

64. Report, *supra* note 58, at 79. See ILO Declaration, *supra* note 57, at ¶ 54, for a similar proposal.

65. Report, *supra* note 58, at 78.

66. See § IV.C *infra*.

67. The Commission was established on December 5, 1974, E.S.C. Res. 1913, 57 U.N. ESCOR, Supp. (No. 1A), U.N. Doc. E/5570/Add. 1 (1975); and the Centre on Transnational Corporations was established on August 2, 1974, E.S.C. Res. 1908, 57 U.N. ESCOR, Supp. (No. 1) ¶ 6, U.N. Doc. E/5570 (1974). For an excellent and in-depth discussion of the work of the Commission, see Rubin, *Harmonization of Rules: A Perspective on the U.N. Commission on Transnational Corporations*, 8 LAW & POLY INT'L BUS. 875 (1976) [hereinafter cited as Rubin].

68. E.S.C. Res. 1913, *supra* note 67, at ¶ 4.

69. E.S.C., Comm'n on Transnat'l Corporations, Report on the Fourth Session, 63 U.N. ESCOR, Supp. (No. 12) ¶¶ 13, 68, U.N. Doc. E/1978/52, E/C. 10/43 (1978) [hereinafter cited as Fourth Session Report]; E.S.C., Comm'n on Transnat'l Corporations, Report on the Second Session, 61 U.N. ESCOR, Supp. (No. 5), Annex IV, ¶¶ 2, 42, U.N. Doc. E/5782, E/C. 10/16 (1976) [hereinafter cited as CTC Report].

for the regulation of MNEs.⁷⁰ There is a basic split in the Commission as to whether or not the code should be mandatory or voluntary.⁷¹

As of this writing, the Commission has not formulated a code nor has it made any recommendations concerning regulation of the labor relations of MNEs.⁷² It appears, however, that the labor aspects of any emergent code likely would be an amalgamation of strategies and tactics presently exigent in Europe and North America and those advanced by representatives of the Third World. Without such a combination of methods and philosophies prospects for the attainment of rules acceptable to all are dim.⁷³

Given the tremendous differences between nations regarding the proper international mechanism for control of MNEs, the drafting and passage of a comprehensive code is many years in the future. Although it is possible that a partial code, regulating only labor relations, might be implemented sooner, control of the labor relations activities of multinationals will be left up to individual States for the foreseeable future. Since the United States is home to the greatest number and most influential of MNEs,⁷⁴ its laws are crucial to any regulatory scheme.

IV. THE APPROACH OF THE UNITED STATES

The existing legal framework of modern labor-management relations in the United States was borne in an era of relative national economic independence. As a result the original National Labor Relations Act (NLRA),⁷⁵ the Labor Management Relations Act (LMRA),⁷⁶ and the subsequent amendments and additions thereto,⁷⁷ have limited the scope of legal regulation to the boundaries of the nation.⁷⁸ Legislative, administrative and judicial policymakers have failed to recognize the present transnational scope of labor relations issues and thus have neither adapted preexisting standards nor enacted new rules to correspond to changed circumstances.

To successfully implement reforms of the legal framework of labor relations in the U.S., it is necessary to determine initially the status of the multinational employer within that system. The extraterritorial reach of U.S. labor laws is

70. Rubin, *supra* note 67, at 886.

71. The Report of the Group of Eminent Persons recommended that the code it envisioned be non-compulsory, Report, *supra* note 58, at 55, but the Commission is divided on whether to accept this recommendation. CTC Report, *supra* note 69, at ¶¶ 43-44.

72. See, e.g., Fourth Session Report, *supra* note 69, at ¶¶ 12-15; E.S.C. Comm'n on Transnat'l Corporations, Transnational Corporations in World Development: A Re-Examination, U.N. Doc. E/C. 10/38 (1978) [hereinafter cited as Re-Examination].

73. See Rubin, *supra* note 67, at 889.

74. See Re-Examination, *supra* note 72, at 211, table III-8.

75. 29 U.S.C. §§ 151-59 (1976).

76. 29 U.S.C. §§ 141-97 (1976).

77. Pub. L. No. 86-257, 73 Stat. 541 (1959); Pub. L. No. 93-360, 88 Stat. 395 (1974).

78. See § IV.B *infra*.

relevant in this context as is the legality of certain economic weapons available to unions in their struggles against the MNEs.

A. *Status of MNEs as Employers: Singular or Plural Entities?*

The MNE can choose among a variety of legal forms to establish its presence in more than one country. Those that are most suitable to the particular business activities engaged in will be chosen.⁷⁹ But, mere juridical existence often does not reflect accurately the true dispersal of management and control functions within the enterprise. The parent corporation has the option of retaining centralized decision-making authority or engaging in arms length transactions, depending upon various legal implications.⁸⁰ Consequently, it may be necessary to pierce the corporate veil in order to deal with the actual as opposed to legal status of the parent and its subsidiaries.

Many factors are relevant to such an analysis, some of which are: 1) degree of ownership of the subsidiary; 2) existence of common officers or directors; 3) the degree of intermingling or separation of accounts, tax returns, etc.; 4) undercapitalization of the subsidiary; 5) representations by either parent or subsidiary which tend to obscure the legal separation of the entities; 6) degree of supervision of the day-to-day operation of the subsidiary; and 7) ultimate responsibility for operation of the subsidiary. No single factor is decisive; they are often combined to support the decision.⁸¹

The position of the U.S. Government regarding unitary corporate existence on an international level is as follows:

When a subsidiary acts on behalf of a foreign parent, and there is such an identity of interest between the two or such control by one over the other that the one is in reality the alter ego of the other, or its mere agent, instrumentality, or adjunct, then the parent comes within the U.S. jurisdiction.⁸²

For purposes of coverage of the U.S. labor laws, whether a given MNE is considered a single employer entity, or two or more separate employers, depends

79. For an excellent summary of the various forms and stages of MNE existence, see Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 LAW & POL'Y INT'L BUS. 375, 378-83 (1974) [hereinafter cited as Griffin].

80. For example, antitrust and tax problems may dictate tight or loose control respectively. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968), for a discussion of antitrust considerations, and I.R.C. § 482; Kragen, *Avoidance of International Double Taxation Arising From Section 482 Reallocations*, 60 CALIF. L. REV. 1493 (1972), for an example and discussion of a statutory attempt to prevent tax evasion by MNEs.

81. Griffin, *supra* note 79, at 389; W. L. CARY, CASES AND MATERIALS ON CORPORATIONS 109-49 (1969); Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L. J. 1 (1978) [hereinafter cited as Krendl & Krendl]; Annot., 38 A.L.R.2d 1102 (1971).

82. U.S. Dep't of Justice, Memorandum Transmitted to the Embassy of Japan, Washington, D.C., with Note (July 3, 1958), reprinted in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 6, at 118-19 (1968).

almost entirely upon the question of common labor relations control.⁸³ Such a determination is crucial to labor organizations in their dealings with MNEs. If an enterprise is recognized as one employer with a multinational existence, then potentially powerful union weapons against all corporate subsidiaries, such as strikes, picketing and boycotts, will be permitted as lawful primary activity. But if the MNE is deemed a separate employer in each of its locations, then these same actions will be secondary and prohibited by U.S. law.⁸⁴ Therefore, the definition of "employer" under our labor laws and its application to MNEs has far-reaching effects on unions' abilities to use traditional economic weaponry to combat transnational capital.

Under section 2(2) of the NLRA, "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . .";⁸⁵ and under section 2(1) thereof "[t]he term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."⁸⁶ The combination of these definitions leads to a rather amorphous and circuitous conception of an employer when viewed against modern corporate organization. Obviously, administrative and judicial interpretations of these sections are needed to give effect to congressional intent.

The National Labor Relations Board (NLRB or Board) is the administrative body which implements the major U.S. labor relations laws.⁸⁷ The Board has held, with court approval, that separate corporate subsidiaries are separate persons or employers "if neither the subsidiaries nor the parent exercises actual or active, as opposed to merely potential control over the day-to-day operations or labor relations of the other."⁸⁸ Thus, what is needed to establish that the enterprise as a whole is an employer is both common ownership *and* common control.⁸⁹

This "single enterprise doctrine" devised by the NLRB is ill-suited to the

83. Gould, *supra* note 5, at 661.

84. See § IV.C *infra*.

85. NLRA § 2(2), 29 U.S.C. § 152(2) (1976).

86. *Id.* § 2(1), 29 U.S.C. § 152(1) (1976).

87. See *id.* § 3-6, 29 U.S.C. §§ 153-56 (1976).

88. Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303, 304 (1970), *enf'd per curiam*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); accord AFTRA Washington-Baltimore Local, AFL-CIO, 185 N.L.R.B. 593 (1970), *enf'd*, 462 F.2d 887 (D.C. Cir. 1972).

89. General Teamster, Warehouse and Dairy Employees, Local No. 126, 175 N.L.R.B. 630 (1969), *enf'd*, 435 F.2d 288 (7th Cir. 1970); Miami Newspaper Pressman's Local No. 46, 138 N.L.R.B. 1346 (1962), *enf'd*, 322 F.2d 405 (D.C. Cir. 1963); Drivers, Chauffeurs and Helpers Local 639, 158 N.L.R.B. 1281 (1966). This test has been applied to situations of substantial joint ownership as well as circumstances of corporate subsidiaries. See, e.g., Teamsters Local 749, 218 N.L.R.B. 1330 (1975); Teamsters Local 616, 203 N.L.R.B. 645 (1973). For an excellent and comprehensive summary and analysis of all relevant Board and court decisions under the single enterprise doctrine, see Annot., 13 A.L.R. FED. 466, 532-604 (1972 & Supp. 1978). The Board's position regarding the separate-unitary employer issue is in accord with corporate law. As a general rule, a parent corporation is not liable for the acts of its subsidiaries; but the former may

realities of corporate conglomerates and multinationals because not only is it extremely difficult to determine the exact degree of control exercised by a parent over a subsidiary, but also financial control — the ultimate authority — is usually centralized in the parent.⁹⁰ The latter was persuasively argued in dissent by Member Brown in *AFTRA Washington-Baltimore Local, AFL-CIO*:

In this case we are confronted by nothing more than a labor organization's attempt to apply strike pressures upon a single corporate enterprise to secure concessions in its dispute with a segment of that enterprise. . . . That [the parent corporation] is a direct party to labor disputes involving its separate divisions is not only inherent in the structure of the enterprise but is a matter of cold economic fact.⁹¹

Recognizing that, in other contexts, courts and legislatures are adopting an economic realities analysis,⁹² it is inappropriate that the Board should cling to

be held responsible for the obligations of the latter when the subsidiary is a mere agent, instrumentality of adjunct of the parent corporation. Krendl & Krendl, *supra* note 79; Comment, *Disregarding the Corporate Entity: Contract Claims*, 28 OHIO ST. L. J. 441 (1967) [hereinafter cited as *Disregarding the Corporate Entity*]; Annot., 38 A.L.R.2d 1102 (1972); *cf.* note 82 and accompanying text. Underlying this theory is a fundamental tenet of Anglo-American law: a corporation is a legal entity separate from its shareholders. *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905); *Salomon v. A. Salomon & Co.*, [1897] A.C. 22, 38; W. FLETCHER, *CYCLOPEDIA OF CORPORATIONS* 99 (rev. vol. 1974).

90. Gould, *supra* note 5, at 661.

91. *AFTRA Washington-Baltimore Local, AFL-CIO*, 185 N.L.R.B. 593, 594 (1970) (Brown, M., dissenting), *enfd*, 462 F.2d 887 (D.C. Cir. 1972). See Smith, *The Supreme Court, Boys Markets Labor Injunctions, and Sympathy Work Stoppages*, 44 U. Chi. L. Rev. 321 (1977), who argues that "[d]espite corporate divisional or subsidiary structure only one 'person' exists for the purposes" of the NLRA. *Id.* at 343 n.96.

92. See *United States v. Watchmakers of Switz. Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955), for an example of treating two corporate entities as one to bring the foreign parent within the jurisdiction of U.S. antitrust laws. Indeed, there is a growing recognition both abroad and in the U.S. that an "economic realities" test should be used in cases where one corporation is beneficially owned by another corporation. In the United Kingdom, there is evidence of a general tendency of courts to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group. L. C. B. GOWER, *MODERN COMPANY LAW* 213, 216 (1969); see *Merchandise Transport Ltd. v. British Transport Comm'n*, [1962] 2 Q.B. 193, 202 (C.A.); *Spittle v. Thames Grit & Aggregates Ltd.*, [1937] 4 All E.R. 101, 103. In the Federal Republic of Germany, the Stock Corporation Law of 1965, Law of Sept. 6, 1965, [1965] BGBI I 1089, treats a corporate group — parent and subsidiaries — as an economic unit *sui generis*. Wälde, *Parent-Subsidiary Relations in the Integrated Corporate System: A Comparison of American and German Law*, 9 J. INT'L L. & ECON. 455, 492 (1974) [hereinafter cited as Wälde].

The NLRB should recognize that the basic policy consideration inherent in the traditional American rule, *i.e.*, limited liability of shareholders, is inapplicable to actions under U.S. labor laws. See Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L. J. 193, 193-94 (1929). The reasons for disregarding the corporate fiction are different in contracts cases than they are in torts cases, different still in cases involving violation of a statute, or application of internal revenue laws, or the law of fiduciary obligations. *Disregarding the Corporate Entity*, *supra* note 87, at 467 (and cases cited therein). It is the view of the author that the purposes of U.S. labor laws would be served best if the Board adopted some form of an "economic realities" test and abandoned the formalistic "single enterprise doctrine." See notes 215-17 *infra* and accompanying text.

so narrow a conception of corporate existence.⁹³ As will be argued below,⁹⁴ it is necessary that the present single enterprise doctrine be modified to include therein the various components of MNEs so that unions can adequately counter the *de facto* assistance rendered by subsidiaries to parents, as well as parents to subsidiaries, when a union is engaged in a lawful dispute with either.

Closely related to the problem of corporate identity in the multinational context is the issue of extraterritorial reach of U.S. labor laws. In order for the mandates of collective bargaining or remedies of unfair labor practices to be carried out, a foreign subsidiary of an American MNE or a foreign parent MNE of an American-based subsidiary may be called upon by the Board to undertake some form of affirmative conduct. The issue then involves the jurisdiction of U.S. labor laws over these foreign entities.

B. *Extraterritorial Application of U.S. Labor Laws*

The power of Congress "to regulate Commerce with foreign Nations" is contained in Article 1, Section 8 of the Constitution.⁹⁵ Pursuant to this authority Congress has enacted several labor-management relations statutes to govern industrial strife "in order to promote the full flow of commerce"⁹⁶ and "to eliminate the causes of certain substantial obstructions to the free flow of commerce. . . ."⁹⁷ The question of the extent to which the NLRB and courts should exercise jurisdiction over foreign corporations and nationals under these Acts is a matter of controversy.⁹⁸ In each case it must be decided 1) whether Congress intended to exercise its constitutional power to regulate commerce so as to reach the extraterritorial conduct in question; and 2) whether in the exercise of administrative or judicial discretion the Board or the courts should take jurisdiction in a particular case.

93. The main rationale relied upon by the Board is that the congressional purpose behind the secondary prohibitions of NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976), from which the single enterprise doctrine arose, was to insulate the neutral or secondary employer and prevent the unnecessary spread of the union-management conflict by narrowing the areas of dispute. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *NLRB v. Denver Bldg. Council*, 341 U.S. 675 (1951); Ross, *American Legal Restrictions on the Use of Economic Weapons Against Multinational Employers*, 10 CORNELL INT'L L. J. 59, 61 (1976-1977) [hereinafter cited as Ross]. See § IV.C *infra* for a full explication of the use of secondary activities by unions.

94. See text accompanying notes 180-84 *infra*.

95. U.S. CONST. art. I, § 8.

96. LMRA § 1, 29 U.S.C. § 141 (1976).

97. NLRA § 1, 29 U.S.C. § 151 (1976).

98. See, e.g., Nothstein & Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 CORNELL INT'L L. J. 1 (1976-1977) [hereinafter cited as Nothstein & Ayres]; Comment, *Foreign Ships in American Ports: The Question of NLRB Jurisdiction*, 9 CORNELL INT'L L. J. 50 (1975-1976) [hereinafter cited as Comment, *Foreign Ships*]; Comment, *Flags of Convenience and NLRB Jurisdiction*, 60 NW. U. L. REV. 195 (1965); Note, *Labor Law, International Law and Panlibhon Fleet*, 36 N.Y.U. L. REV. 1342 (1961).

1. Congressional Intent

Section 2(6) of the NLRA defines "commerce" as "trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State, Territory, or the District of Columbia" or "through any other State or any Territory or the District of Columbia or any foreign country."⁹⁹ On its face, this definition has a broad international scope of subject matter jurisdiction.¹⁰⁰ The legislative history of this definition also indicates that it was intended to give the NLRB all the power constitutionally delegable under the Commerce Clause.¹⁰¹ Board and court interpretations, however, have severely narrowed the international scope of subject matter jurisdiction under the NLRA.¹⁰²

2. Supreme Court and NLRB Decisions

a. *The Maritime Jurisdiction Cases*

In the leading case of *Benz v. Compania Naviera Hidalgo, S.A.*,¹⁰³ the Supreme Court discussed Board jurisdiction over unfair labor practices¹⁰⁴ involving foreign parties. In *Benz*, a foreign shipowner brought a common-law tort action against an American union which was engaged in peaceful picketing of a foreign flagship.¹⁰⁵ The ship was temporarily in a U.S. port and the picketing was in furtherance of a strike over internal matters by the foreign crew.

Placing the issue in perspective, the Court noted at the outset that

the dispute from which these actions sprang arose between a foreign employer and a foreign crew operating under an agreement made

99. NLRA § 2(6), 29 U.S.C. § 152(6) (1976). The NLRB is empowered to prevent any unfair labor practices affecting commerce. NLRA § 10(a), 29 U.S.C. § 160(a) (1976). "Affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id.* § 2(7), 29 U.S.C. § 152(7) (1976).

100. Ross, *supra* note 93, at 63.

101. The jurisdictional definitions were "based squarely on the power of Congress to regulate commerce among the several States and with foreign nations. . . ." H. R. REP. NO. 969, 74th Cong., 1st Sess. 8, 6 NLRB, LEGISLATIVE HISTORY OF THE NLRA 2918 (1935). This same comment was repeated at H. R. REP. NO. 972, 74th Cong., 1st Sess. 8-9, 6 NLRB, LEGISLATIVE HISTORY OF THE NLRA 2964 (1935); H. R. REP. NO. 1147, 74th Cong., 1st Sess. 10, 6 NLRB, LEGISLATIVE HISTORY OF THE NLRA 3057 (1935).

102. In this context, the LMRA is coextensive with the NLRA. *See* LMRA § 501, 29 U.S.C. § 142(3) (1976); NLRA § 2(6), 29 U.S.C. § 152(6) (1976).

103. 353 U.S. 138 (1957).

104. The Board has jurisdiction over unfair labor practices if they are "affecting commerce." NLRA § 10(a), 29 U.S.C. § 160(a) (1976); *see* note 99 *supra*.

105. A foreign flagship is the equivalent of foreign territory for many purposes. *See* Convention on the High Seas, April 29, 1958, [1958] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; *Wildenhuis's Case*, 120 U.S. 1 (1887).

abroad under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.¹⁰⁶

Because of the foreign elements involved, the Court squarely held that the NLRB lacked jurisdiction to consider the controversy.¹⁰⁷

This decision was based upon an analysis of the legislative history of the LRMA. After noting that "if Congress had so chosen, it could have made the Act applicable. . . ,"¹⁰⁸ Mr. Justice Clark, writing for the majority, stated that

[t]he question here therefore narrows to one of intent of the Congress as to coverage of the Act.

The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act.¹⁰⁹

The Court thus concluded that "[t]he whole background of the Act is concerned with industrial strife between *American* employers and employees."¹¹⁰

A strong undercurrent running throughout the decision is the notion of the proper role of the Board and the Court in adjudicating cases which involve issues of international relations. The majority deferred to the will of Congress in denying NLRB jurisdiction:

For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.¹¹¹

Faced with this limitation on its subject matter jurisdiction, the NLRB in a trilogy of 1961 cases distinguished *Benz* in such a way as to create an entirely new test which, though not in direct conflict with *Benz*, was surely without its spirit. The most important of these cases was *West India Fruit & Steamship Co., Inc.*¹¹² An American union filed a complaint with the Board alleging NLRA

106. 353 U.S. at 142.

107. *Id.* at 147.

108. *Id.* at 142.

109. *Id.* But see note 101 *supra* and accompanying text.

110. 353 U.S. at 143-44 (emphasis added).

111. *Id.* at 147. These jurisdictional limitations problems are applicable in areas of international trade as well. Similar involvement in foreign employment relations can easily result from American union actions against MNEs, such as secondary activities against MNE subsidiaries. See § IV.C *infra*.

112. 130 N.L.R.B. 343 (1961). The other two cases, *Peninsular & Occidental Steamship and Green Trading Co.*, 132 N.L.R.B. 10 (1961), and *Eastern Shipping Corp.*; *McCormick Shipping Corp.*, 132 N.L.R.B. 930 (1961), were consolidated with *West India* for hearing on the jurisdictional issues. 130 N.L.R.B. at 345. *P. & O. Steamship* and *Eastern Shipping* are discussed below.

section 8(a)(1) and (3)¹¹³ unfair labor practices by a U.S. corporation. The company owned a Liberian registered ship which operated as a common carrier between Cuba and Louisiana. The crew of the ship, who were Cuban resident nationals, were allegedly threatened in an attempt to discourage their membership in the union and discriminated against because of said membership. These violations allegedly occurred upon the high seas and in Cuban territorial waters.

The NLRB first determined¹¹⁴ that, because the ship regularly sailed between the U.S. and Cuba, it was clearly in "commerce" as defined by the Act,¹¹⁵ and that the alleged unfair labor practices involved the crew of the ship and thus was "affecting commerce" as so defined.¹¹⁶ Having determined that Congress intended to exercise its constitutional power to reach the conduct involved in this case, the Board then considered whether the foreign contacts present in the case would limit or bar the jurisdiction of the Act. Neither the ship's foreign registry,¹¹⁷ nor the nonresident alien status of the crew¹¹⁸ were deemed sufficient to divest the Board of jurisdiction. In so holding, the NLRB limited *Benz* to its particular facts¹¹⁹ and fashioned a "contacts" approach to decide this and future cases with similar jurisdictional issues.¹²⁰ Since the ship was engaged in "substantial continuing American foreign commerce" and the employer was an American corporation, the scales were tipped in favor of applying the NLRA.¹²¹

113. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976) makes it an unfair labor practice for an employer to interfere with an employee's right to join a union; and NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), makes it an unfair labor practice for an employer to discriminate against an employee because of his union membership.

114. 130 N.L.R.B. at 349.

115. NLRA § 2(6), 29 U.S.C. § 152(6) (1976); see note 99 *supra* and accompanying text. The Board later stated that

in Section 2(6), Congress has expressly stated that the Act shall apply to foreign commerce such as that in which the *Sea Level* participates. Furthermore, we have no doubts, in view of pertinent court decisions, that a general grant of power over foreign commerce, such as in the Labor Act, of necessity includes the authority to reach prohibited acts even though occurring in foreign territory when such acts have a direct effect on trade between the United States and foreign countries.

130 N.L.R.B. at 350-51 (citations omitted).

116. NLRA § 2(7), 29 U.S.C. § 152(7) (1976); see note 99 *supra*.

117. 130 N.L.R.B. at 359.

118. *Id.* at 360-61. It was noted that "the workingmen covered are at least those employed by a domestic employer in the foreign commerce of the Nation." 130 N.L.R.B. at 363 n.77. *Cf.* the finding in *Benz*, *supra* note 110 and accompanying text.

119. The Board stated that "*Benz* can surely be distinguished on its facts," 130 N.L.R.B. at 361, and found no support in *Benz* for the proposition that the presence of "foreign factors alone bars the Act when the undertaking is, as here, essentially an American enterprise operating almost exclusively, if not wholly in American commerce. . . ." 130 N.L.R.B. at 362.

120. The Board's task was "to determine whether or not the facts in the present situation which constitute *contacts* between the operation of the *Sea Level* and the United States are *substantial* — that is more than minimal but not necessarily preponderant." 130 N.L.R.B. at 355 (emphasis added) (citations omitted).

121. *Id.* at 355.

West India clearly circumvented the spirit of *Benz*. The Board disavowed the essence of *Benz*, i.e., no interference in the delicate field of international relations, by focusing on the American factors and virtually ignoring the potentially disruptive foreign contacts.¹²²

The contacts approach was again applied in two cases decided shortly after *West India*. *Peninsular & Occidental Steamship Co. and Green Trading Co.*,¹²³ involved a foreign registered ship with a nonresident alien crew, which was operating between Florida and islands in the Caribbean. The vessel was owned and operated by Liberian subsidiaries of an American corporation. Thus the only substantial difference between the facts of *West India* and those of *P & O Steamship* was the imposition of foreign corporate subsidiaries in the ownership and operation of the vessel. The Board held that such an arrangement was ineffective to bar jurisdiction of the NLRA where the corporate parent had full control of the ship, was its beneficial owner and was otherwise within the coverage of the Act.¹²⁴

*Eastern Shipping Corp.; McCormick Shipping Corp.*¹²⁵ involved facts similar in all essential respects to *P & O Steamship* except that here the vessel was owned and operated by a foreign corporation which was itself owned by nonresident aliens. This corporation entered into an agency contract with a Miami-based American firm to handle matters concerning passengers, cargo, repairs and provisioning of the ship. After restating its contacts rule developed in *West India* and *P & O Steamship*,¹²⁶ the Board determined that the operation of the

122. *Id.* at 363-64. The Board paid lip service to the "incipient conflict with rights of foreign nations" emphasized in *Benz*, 130 N.L.R.B. at 363, but considered the instant situation "vastly different for we are dealing with essentially American commerce and the American shipowner." 130 N.L.R.B. at 364.

The U.S. Attorney General filed a brief with the NLRB on behalf of the Department of State on matters of maritime and international law present in the case. 130 N.L.R.B. at 345 n.4. The Department of State felt strongly that assertion of jurisdiction by the NLRB would have "potentially serious international repercussions in the relations between the United States" and the foreign flag countries involved in *West India* and its progeny. Evidence thereof came in the form of diplomatic notes received by State from the Governments concerned. Letter from Secretary of State Dillon to Attorney General Rogers (Oct. 27, 1960), reprinted in 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 27, 30 (1968). Despite such a warning from executive branch of the U.S. Government concerned with foreign affairs, the Board asserted jurisdiction because of the American contacts present.

123. 132 N.L.R.B. 10 (1961).

124. *Id.* at 12.

125. 132 N.L.R.B. 930 (1961).

126.

[A]s we concluded in the *West India* and *Peninsular & Occidental* cases, the mere presence of . . . foreign attributes . . . does not necessarily require a finding that the Act does not cover the maritime operation involved or that the Board should not assert jurisdiction. Rather the question of jurisdiction is to be decided by determining whether or not *substantial contacts* exist between the maritime operation and important United States interests, a determination that can only be made upon the facts of the particular case.

132 N.L.R.B. at 930-31 (emphasis added) (citation omitted).

vessel was "a single integrated enterprise in which the various activities essential to the success of the venture are divided between two companies."¹²⁷ Because the "primary purpose" of the enterprise was "to participate in the commerce of this Nation," it was covered by the NLRA, notwithstanding the foreign elements involved.¹²⁸

These three decisions of the Board, in developing and implementing the contacts approach, successively moved further and further away from the Supreme Court's holding and rationale in *Benz*. As the American connections became more tenuous with each case, the possibility of "international discord" arising from assertion of extraterritorial jurisdiction over foreign corporations, vessels and crews became more probable. This is not to say that *Benz* was correct in its rationale; it is merely to stress the dichotomy between what the Court saw as the proper role of the NLRB in this area and what the Board felt was its duty under the Labor Act. Thus, the stage was set for the Supreme Court either to repudiate *Benz* and accept the *West India* line of analysis, or to reject the contacts approach and reaffirm a hands-off policy to cases involving foreign elements.

The scenario was played out in two cases decided in early 1963. The first of these, *McCulloch v. Sociedad Nacional de Marineros de Honduras*,¹²⁹ had facts similar to *P & O Steamship*,¹³⁰ with the added factor of representation by the crew of a Honduran labor union pursuant to the Honduran Labor Code.¹³¹ Mr. Justice Clark, the author of *Benz*, again wrote for the Court. He explicitly rejected the *West India* contacts approach,¹³² and reaffirmed the rationale of *Benz*:

We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews. Therefore, we find no basis for a construction which would exert

127. *Id.* at 932.

128. *Id.* at 933-34.

129. 372 U.S. 10 (1963).

130. *I.e.*, an American corporation's wholly owned foreign subsidiary owns and operates a foreign registered vessel with a nonresident alien crew between ports in the United States and Latin America.

131. 372 U.S. at 14.

132.

[T]o follow [the contacts theory] to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice.

372 U.S. at 19 (citation omitted).

United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag. . . .¹³³

The international ramifications inherent in applying the NLRA to seamen already subject to foreign labor laws also were stressed by the Court: "The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction."¹³⁴ *McCulloch* thus reasserted the principle of *Benz*, i.e., that interference in the delicate field of foreign relations by the Board must rest on "the affirmative intention of Congress clearly expressed."¹³⁵ Since that intent was found lacking, jurisdiction would be denied.

Inces Steamship Co., Ltd. v. International Maritime Workers Union,¹³⁶ the companion case to *McCulloch*, held squarely that "the maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6), 29 U.S.C. § 152(6)."¹³⁷ The dissolution of *West India* was thus complete, since its contacts theory was founded upon a contrary interpretation of "commerce" as defined in the NLRA.¹³⁸

The last in the line of cases dealing with maritime affairs have expanded the "no interference in international relations" rationale first enunciated in *Benz* to apply to U.S. domestic situations which may have an extraterritorial effect. In *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*,¹³⁹ the Court held that picketing by American unions to protest the allegedly substandard wages paid foreign seamen of foreign ships came within the rule of *Benz* because "[v]irtually none of the predictable responses of foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting *American* workingmen which the LMRA was designed to regulate."¹⁴⁰ Neither is such picketing a prohibited secondary activity which would invoke Board jurisdiction under the NLRA. As was held in *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n, Inc.*,¹⁴¹ such union activity is not in "commerce" because the purpose of the picketing was to affect wages paid foreign seamen who were outside the jurisdiction of the Act.¹⁴²

133. *Id.* at 20.

134. *Id.* at 21.

135. *Id.* at 22; *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

136. 372 U.S. 24 (1963).

137. *Id.* at 27.

138. See note 115 *supra* for an explication of the Board's rationale in *West India* which was rejected by *Inces*.

139. 415 U.S. 104 (1974).

140. *Id.* at 115.

141. 419 U.S. 215 (1974).

142. *Id.* at 224.

The Supreme Court in these two cases broadened the "no interference in international relations" test to include even those domestic activities that would have an extraterritorial economic effect on the foreign shipowner.¹⁴³ Thus, as the law now stands, where the direct effect of the economic activity by an American union is outside of the employment relationship of its members, the NLRB is without jurisdiction because the activity in question is not in and does not affect U.S. commerce as defined by the Act.¹⁴⁴

b. *Recent Representation and Bargaining Unit Cases: NLRB Withdrawal*

Having learned its lesson after being rebuked by the Supreme Court in *McCulloch* and its progeny, the NLRB has recently held either that it lacked jurisdiction or that it would decline to exercise jurisdiction¹⁴⁵ in a series of representation decisions.¹⁴⁶ The primogenitor of this line of cases is *RCA OMS Inc. (Greenland)*.¹⁴⁷ In this case, a union sought to represent American employees of a U.S. subsidiary of RCA who were doing defense work at five Distant Early Warning (DEW Lines) sites located in Greenland. Despite the facts that the employees were all Americans, were required to have U.S. Government security clearances, were hired in the United States, were paid from the United States, were returned to their original hiring location in the U.S. upon completion of their jobs, and worked for an American employer, the Board concluded "that Greenland does not come within the jurisdiction of the Act."¹⁴⁸ The only authority cited for this holding was *Benz v. Compania Naviera Hidalgo, S.A.*¹⁴⁹

However, the holding in *RCA OMS* does not follow from that of *Benz*. Whereas in the latter, the Court refused to extend NLRA jurisdiction to foreign employers of a wholly foreign enterprise operating on what is the equivalent of foreign territory (the foreign flagship), in the former, the Board refused to apply the Act to American employees of an American enterprise operating partly in the United States and partly in a foreign country. The factual differences make the cases easily distinguishable.¹⁵⁰ Only the "no in-

143. See *Windward Shipping (London) Ltd. v. American Radio Ass'n*, AFL-CIO, 415 U.S. 104, 114 (1974).

144. Ross, *supra* note 93, at 67; Comment, *Foreign Ships*, *supra* note 98, at 67.

145. The NLRB has discretionary authority to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ." NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976).

146. The NLRA gives to the Board the power to determine appropriate bargaining units, NLRA § 9(b), 29 U.S.C. § 159(b) (1976), and the power to certify unions as the proper representatives of employees. *Id.* § 9(c)(1), 29 U.S.C. § 159(c)(1) (1976).

147. 202 N.L.R.B. 228 (1973).

148. *Id. Accord* GTE Automatic Electric Inc., 226 N.L.R.B. 1222 (1976); *cf.* Freeport Transport Inc., 220 N.L.R.B. 833 (1975).

149. 353 U.S. 138 (1957).

150. *Accord* Nothstein & Ayres, *supra* note 98, at 24.

terference in international relations'' rationale of *Benz* could support the *RCA OMS* holding. Since Greenland's interest in and concern about the labor relations between American employees and their American employer is not so obvious nor is it likely to lead "international discord" or "retaliative action,"¹⁵¹ the Board's refusal to exercise jurisdiction is questionable.

Shortly after *RCA OMS*, the NLRB refused to assert jurisdiction and order an election in a unit composed of Panamanian bus employees who worked in the Canal Zone for an American corporation. The Board, in *Contract Services, Inc.*,¹⁵² relied upon a lower court interpretation of *McCulloch*¹⁵³ to hold that "in deciding whether or not to exercise our discretion to assert jurisdiction herein, the effect thereof on foreign relations is a necessary and proper factor to be considered."¹⁵⁴ Using this standard, the Board concluded "that it would not effectuate the policies of the Act to assert jurisdiction in the instant case since such action might at this time adversely affect United States-Panamanian relations. Accordingly, we shall dismiss the petition."¹⁵⁵ Thus, despite the fact that the Canal Zone was assumed to be a U.S. territory and within jurisdiction of the Act,¹⁵⁶ the Board exercised its discretionary power and refused to assert its jurisdiction because of possible foreign policy ramifications.

Contract Services raises many questions about the outer reaches of the "effect on foreign relations" doctrine therein enunciated. In a global community where the economies of States are interdependent, the labor relations activities in American enterprises can have a substantial impact on foreign enterprises and on the foreign relations of the United States. This is especially true in situations involving MNEs.¹⁵⁷ A labor dispute concerning the U.S. parent of a multinational can have a very substantial impact on its foreign subsidiaries. Likewise, a strike against an American division of a foreign MNE can have adverse consequences for the home corporation. Will the Board henceforth scrutinize every labor dispute against MNEs for their effects on American foreign affairs and decline jurisdiction in all those where those effects are

151. 353 U.S. at 147.

152. 202 N.L.R.B. 862 (1973).

153. *National Maritime Union of America, AFL-CIO v. NLRB*, 267 F. Supp. 117 (S.D.N.Y. 1967), wherein the court stated,

the opinion of the Supreme Court in *McCulloch v. Sociedad Nacional* makes it perfectly clear that considerations of international relations are highly relevant — indeed, indispensable — in determining the extent of the Board's jurisdiction. This court perceives no reason why such considerations are not equally relevant to the Board's determination whether to assert jurisdiction.

Id. at 126.

154. 202 N.L.R.B. at 864.

155. *Id.* at 865.

156. *Id.* at 863.

157. See Rubin, *Multinational Enterprise: The Limits of Theory: Forward*, 6 LAW & POL'Y INT'L BUS. 307, 309 (1974).

deemed too substantial?¹⁵⁸ Will it adopt a *per se* rule excluding all employees who are without the borders of the U.S.?¹⁵⁹ Absent a change of direction by the Board or the Supreme Court, these are distinct possibilities which can have no effect but to increase the already disparate bargaining positions of unions and MNEs.

3. Present Status of the Extraterritorial Application of U.S. Labor Laws

Unlike the extraterritorial effect of U.S. antitrust laws,¹⁶⁰ that of our labor laws is quite limited. The *Windward Shipping-Mobile Steamship* broadening of the original *Benz* "no interference in international relations" test¹⁶¹ has so emasculated the reach of "commerce" under section 2(6),¹⁶² that even "innocuous activity" by American unions which has an economic impact on foreign shipowners "could be beyond the reach of the Board's realm."¹⁶³ Similarly, the *Contract Services* "effect on foreign relations" doctrine, which also grew out of the Court's rationale in *Benz* and by which the NLRB will gauge its discretionary power to decline jurisdiction, could render otherwise legitimate activity which is ordinarily within its jurisdiction, outside of the

158. Such a practice would be tantamount to a balancing of interests approach, similar to the *West India* balancing of contacts analysis, only with the scales tilted this time against exercise of jurisdiction.

159. This is the practical effect of *RCA OMS, Inc.*, 202 N.L.R.B. 228 (1973); *GTE Automatic Electric, Inc.*, 226 N.L.R.B. 1222 (1976) (employees of an American multinational working in Iran excluded from a proposed bargaining unit including American based employees); and *The North American Soccer League and Its Constituent Member Clubs*, 236 N.L.R.B. No. 181, 98 L.R.R.M. 1445 (1978) (employees of Canadian NASL clubs excluded from bargaining unit which included all league players); cf. *Freeport Transport, Inc.*, 220 N.L.R.B. 833 (1975).

160. *E.g.*, the Supreme Court has held that, in enacting the Sherman Act, 15 U.S.C. §§ 1-7 (1976), "Congress wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements. . . ." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944). Consequently, the Act's applicability to foreign commerce is as broad as Congress's power under the Commerce Clause, which includes "every species of commercial intercourse between the United States and foreign nations." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 7 (1824). In the landmark decision of the Second Circuit, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand found that Congress intended to reach conduct outside of the United States which was intended to and actually does have consequences within this country. *Id.* at 144. The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) adopted in a somewhat modified form Hand's "intended effects" test.

The courts currently give the Sherman Act broad reach. See the cases collected and discussed in Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199, 214-19, 220-27 (1977). Thus, the extraterritorial application of the Sherman Act is now well established in United States' law. See also Donovan, *Antitrust Considerations in the Organization and Operation of American Business Abroad*, 9 B.C. INDUS. & COM. L. REV. 239, 242-50 (1968).

161. See notes 143-44 *supra* and accompanying text.

162. NLRA § 2(6), 29 U.S.C. § 152(6) (1976).

163. Comment, *Foreign Ships*, *supra* note 98, at 68.

regulatory authority of the Board. It remains to be seen how far each of these standards will be carried. Suffice it to say that the extraterritorial reach of U.S. labor laws is presently severely limited and that the matter requires significant consideration.

C. *Domestic Union Activity Aimed at MNEs*

An area of conflict which ties together the related single employer-separate employer and extraterritorial effect problems is the status under U.S. labor laws of certain economic weapons available to unions for use against MNEs. The legality or illegality of a given labor activity may well turn on a determination by the Board of the separate or unitary nature of the MNE. If the MNE is deemed unitary, certain NLRB orders may require action by the foreign component of the multinational thereby giving extraterritorial effect to our labor laws.

Strikes, boycotts and picketing are powerful union weapons which can be utilized against MNEs. Their legality in the U.S. depends, however, upon various factors. If the concerted activity is directed against that division of the enterprise which directly employs union members and its purpose is to extract economic concessions from the firm, it is a "primary" action and lawful under the NLRA. On the other hand, if the concerted activity is against a segment of the MNE which is not in a proximate employer-employee relationship, then the action will be deemed "secondary" and prohibited by the Act.¹⁶⁴ Therefore it is important to examine the ramifications of the prohibitions on secondary activity contained in the NLRA since they can act as major obstacles to effective use of union power against multinationals and thereby contribute to the inequality of bargaining power.

Prohibitions on secondary labor pressures long have been present in American law.¹⁶⁵ After a short respite during the 1940s,¹⁶⁶ secondary pressures were made an unfair labor practice in the Taft-Hartley amendments to the NLRA.¹⁶⁷ The Board is empowered to issue a cease-and-desist order.¹⁶⁸ Further, an injunction against probable secondary pressures can be obtained,

164. For a discussion of how the separate divisions of an MNE are treated for purposes of primary or secondary pressures, see § IV.A *supra*.

165. Most states at common law treated coercion against a person who was "uninvolved" in the labor dispute of another company as an illegal exercise of secondary pressure. *E.g.*, *Bricklayer's Union v. Seymour Ruff & Sons*, 160 Md. 483, 154 A. 52 (1931). The Sherman Act prohibited secondary boycotts which affected the delivery or receipt of goods in interstate commerce. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

166. The Supreme Court read the Norris-La Guardia Act, 29 U.S.C. §§ 101-15 (1976), to shelter the secondary boycott from antitrust liability, both civil and criminal. *United States v. Hutcheson*, 312 U.S. 219 (1941).

167. LMRA, ch. 120, § 101, 61 Stat. 140 (1947) (current version at 29 U.S.C. § 158(b)(4)(B) (1976)).

168. NLRA § 10(c), 29 U.S.C. § 160(c) (1976).

even in advance of a Board hearing on the merits.¹⁶⁹ Congress even went so far as to render the secondary boycott a federal tort for which compensatory damages could be sought from the union.¹⁷⁰

While not using the term "secondary boycott," Congress attempted to spell out in detail the conduct which was proscribed in NLRA section 8(b)(4)(B).¹⁷¹ This section prohibits the application of economic pressure to "injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees."¹⁷² The gravamen of the secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who is unconcerned with it.¹⁷³ Even if the primary dispute is outside of the United States, the Board can prohibit an American union from supporting its foreign counterpart by refusing to handle the foreign employer's goods.¹⁷⁴

Recognizing that it is innocent, unconnected third-parties who are to be protected by § 8(b)(4)(B), the NLRB has developed an exception to the secondary pressures prohibition. In general, a secondary employer loses his neutrality when it becomes an "ally" to the primary employer. Under this "ally doctrine," a union may engage in picketing at operations of secondary employers when they do strike work for the primary employer,¹⁷⁵ when the employers are engaged in a "straight-line" operation to produce a single

169. *Id.* § 10(f), 29 U.S.C. § 160(f) (1976).

170. LMRA § 303, 29 U.S.C. § 187 (1976).

171. NLRA § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976), reads:

it shall be an unfair labor practice for a labor organization or its agents —

...
(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
...

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . : *Provided*, that nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

172. 93 CONG. REC. 4198 (1947) (remarks of Sen. Taft) (emphasis added), *reprinted in* 2 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948).

173. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626 n.16 (1967), *citing*, *Int'l Bhd. of Electrical Workers v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950) (Hand, J.); *accord* *Local Union No. 391, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 208 N.L.R.B. 540 (1974); *Consolidated Gas Co. of Savannah*, 107 N.L.R.B. 148 (1953).

174. *Grain Elevator, Flour & Feed Mill Workers, Int'l Longshoremen, Local 418 v. NLRB*, 376 F.2d 774 (D.C. Cir. 1967).

175. *NLRB v. Business Machine & Office Appliance Mechanics Conf. Bd., Local 459*, 228 F.2d 553, 558-59 (2d Cir.), *cert. denied*, 351 U.S. 962 (1955).

product,¹⁷⁶ and in cases where two or more corporations constitute a single employer in fact.¹⁷⁷

The Board often has applied § 8(b)(4)(B) to corporate conglomerates. It developed the "single enterprise doctrine" to deal with such cases. This doctrine holds that if the parent exercises actual or active control over the day-to-day operations or labor relations of the subsidiary then both are deemed to be a single employer.¹⁷⁸ A union then may apply economic pressure against both without violating the standard of § 8(b)(4)(B). If the requisite degree of control is absent, union pressure against the corporate arm which is not in a proximate employer-employee relationship with union members would violate § 8(b)(4)(B).¹⁷⁹ The union would have to prove the existence of an ally relationship to prevent an unfair labor practice charge being preferred against it.

The present single enterprise and ally doctrines are wholly unrealistic in their application to MNE-union relationships.¹⁸⁰ They ignore the economic realities of the multinational because a labor dispute with any segment of the MNE affects the economic health of the entire enterprise.¹⁸¹ Indeed, the rationale underlying § 8(b)(4)(B) compels a change in Board policy. Since the various divisions of a corporate conglomerate are not third parties *wholly unconcerned* with the labor dispute, they are not entitled to insulation from the ramifications of the controversy.¹⁸²

By removing this artificial barrier to effective union action against the MNE, the Board would help equalize the presently existing unequal bargaining situation by making the MNE more amenable to the union pressures.¹⁸³ Coordinated transnational union strategies would be possible because American unions would be allowed to engage in economic activity in support of foreign workers employed by the same MNE.¹⁸⁴ Since such labor solidarity will result in an increase in labor power, union demands will be achieved more

176. Packinghouse Employees & Warehousemen's Union Local 616, 203 N.L.R.B. 645, 647 (1973).

177. Miami Newspaper Pressman's Local No. 46 v. NLRB, 322 F.2d 405 (D.C. Cir. 1963); Annot., 13 A.L.R. FED. 466 (1972); see § IV.A *supra*.

178. See the cases cited in notes 88-89 *supra* and accompanying text.

179. *Id.*

180. See notes 90-93 *supra* and accompanying text.

181. See Wälde, *supra* note 92, at 487, who posits that the independent pursuit of profit by the parent and subsidiary leads to sub-optimization of profits for the group. Efficient management requires that the subsidiary be subjected to the objective of group profit maximization. Since "central coordination typifies most MNE's today," *id.*, it follows that any action which adversely affects the profits of one segment of the group, has the same effect on the integrated economic entity as a whole. Labor strife is one factor which causes lost profits; therefore, the enterprise as a whole is both affected by and concerned with the labor relations of each segment.

182. AFTRA Washington-Baltimore Local, AFL-CIO, 185 N.L.R.B. 593, 594 (1970) (Brown, M., dissenting), *enfd.*, 462 F.2d 887 (D.C. Cir. 1972); Gould, *supra* note 5 at 661.

183. See Ross, *supra* note 93, at 84-86.

184. See note 13 *supra*.

readily than is presently the case. Removal of the secondary prohibitions now existing will occur only through Congressional action unless there is a striking reversal of policy by the NLRB and the courts.

V. THE NEED FOR LEGISLATIVE REFORM

Labor organizations in the United States have attempted to enlist governmental support to achieve their goal of reducing the power of MNEs relative to unions. These attempts have focused primarily on expanding the breadth of existing labor relations legislation through NLRB and court cases. After successive failures in this regard,¹⁸⁵ new legislation was proposed. It was designed to reduce the causes of the inequality of bargaining power. Congressional supporters of labor sought to amend American trade and tax laws to regulate foreign direct investment, transfers of technology and importation of goods from foreign subsidiaries of MNEs in such a way as to prevent or minimize adverse impacts on employment and bargaining strength of U.S. workers. The defeat of this legislation was more a result of choosing the wrong avenue of reform than of the defectiveness of the ultimate goals of the proposed changes.

It is the author's contention that rather simple amendments to the National Labor Relations Act would go far towards achieving labor's goal. Organized labor has yet to suggest any changes in the NLRA to remedy the present power imbalance.¹⁸⁶ The abortive trade and tax law changes and the proposed amendments will be discussed at length below.

A. *The Burke-Hartke Bill*

The AFL-CIO in 1971 developed and supported legislation outside the NLRA as an alternative approach to strengthen labor's position *vis-à-vis* the multinationals. The Burke-Hartke Bill¹⁸⁷ sought to impose major new constraints on MNEs. First, through elimination of taxation deferral of foreign income until repatriated to the U.S. and by permitting only deductions as opposed to credits for payment of foreign taxes,¹⁸⁸ it would increase U.S. tax liabilities of corporations doing business abroad.¹⁸⁹ Second, it would require a presidential prohibition of all direct or indirect investments of capital and transfers of technology abroad when such action would result in a net decrease

185. See § IV *supra*.

186. Kujawa, *supra* note 1, at 942.

187. S. 2592, 92d Cong., 1st Sess., 117 CONG. REC. 33584 (1971). For a discussion of the major aspects of the Bill, see AMERICAN MULTINATIONALS, *supra* note 1, at 111-12.

188. S. 2592, tit. I, 92d Cong., 1st Sess., 117 CONG. REC. 33584-86 (1971).

189. For the proposition that a credit is worth more to a taxpayer than a deduction, see S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION CASES AND MATERIALS 114 (1972).

in employment in the United States.¹⁹⁰ Third, new disclosure of information requirements would be imposed on U.S. MNEs to allow Congress to gauge the impact of foreign investment upon American employment.¹⁹¹ Finally, the import of manufactured products would be restricted (especially those produced abroad with American-made components)¹⁹² at least partly to prevent American firms from meeting domestic demand through foreign production.¹⁹³

The AFL-CIO vigorously supported the Bill arguing that it would revamp "U.S. foreign trade, tax and investment laws to overcome growing problems of the export of American jobs, trade imbalances and an increasingly distorted U.S. economy."¹⁹⁴ Opponents of the measures replied that the Bill "would shrink both the exports and imports of the United States, and impose handicaps on the foreign affiliates of U.S. firms that would make it difficult for them to survive against their foreign competitors."¹⁹⁵ Changes in U.S. trade legislation¹⁹⁶ accomplished a small part of the Bill's objectives, but the Bill itself was never even reported out of committee.

The Burke-Hartke Bill was clearly a case of legislative overkill which could not be sold to those members of Congress who were not in total agreement with labor's position. The perceived adverse ramifications on U.S. MNEs and U.S. trade doomed the Bill to failure. In addition it imposed substantive regulation in areas which more properly belong to the dispute resolution procedures of our industrial relations system. Protection of union strength and

190. S. 2592, tit. VI, 92d Cong., 1st Sess., 117 CONG. REC. 33588 (1971).

191. *Id.*, tit. VII, 117 CONG. REC. 33588-89 (1971).

192. *Id.*, tits. III, IV, V, 117 CONG. REC. 33586-88 (1971).

193. For an example of the kind of operation these changes sought to regulate, see *G.M., Chrysler Cut Costs in Mexico Plants*, N.Y. Times, Feb. 7, 1979, § D, at 1, col. 1, which describes how American auto and electronics manufacturers ship U.S. parts just across the Texas border to Juarez, Mexico, for assembly there by cheap labor, and importation back into the U.S. with only a value-added import duty assessed. See also Wall St. J., Feb. 27, 1979, at 32, col. 3.

194. *Multinational Corporations: Hearings Before the Subcomm. on Int'l Trade of the Senate Finance Comm.*, 93d Cong., 1st Sess. 339 (1973) (statement of Andrew J. Biemiller, Director, Dep't of Legislation, AFL-CIO).

195. Letter from Arthur F. Burns, Chairman of the Board of Governors, Federal Reserve System, to Senator Jacob K. Javits (Mar. 16, 1972), reprinted in *The 1972 Economic Report of the President: Hearings Before the Joint Economic Comm.*, 92d Cong., 2d Sess. 183, 184 (1972). Indeed, one commentator has termed the Burke-Hartke Bill "the most protectionist piece of legislation proposed since mercantilist times." Hildebrand, *supra* note 8, at 27.

196. Trade Act of 1974, § 283, 19 U.S.C. § 2394 (1976), provides that firms moving their production facilities outside the U.S. should offer employment opportunities in the U.S. to employees who lose their jobs as a result of the move and to assist those employees in relocation. Also, the Overseas Private Investment Corporation, which insures certain direct foreign investments made by U.S. corporations, is empowered to decline to issue such insurance or investment guarantees to projects which would "significantly reduce the number of [the investor's] employees in the United States. . . ." 22 U.S.C. § 2191(k)(1) (1976), as amended by OPIC Amendments Act of 1978, Pub. L. No. 95-268, § 2, 92 Stat. 213; see note 33 *supra*.

unit employment are subjects over which labor and management should bargain. They should not be imposed by legislative fiat because to do so would be contrary to traditional concepts of American labor law, which favor the establishment of procedures to govern industrial conflicts rather than the imposition of substantive terms upon the parties.¹⁹⁷ Thus, although the basic motivations for the Bill (protection of U.S. employment and union strength) were well-taken, the method of reform chosen was incorrect.

As has been pointed out, it is the interpretations given to present U.S. labor laws that lead to much of organized labor's impotence in dealing with MNEs to protect the jobs and bargaining strength of American workers. What is needed is a series of amendments to the NLRA which overrule the Board and court interpretations and rectify the power imbalance that now exists.

B. *NLRA Amendment Proposals*

The apparent success codetermination has had in Germany and Sweden in curbing MNE bargaining power warrants consideration of its adoption in the United States. Some attempts at employer representation on corporate boards have already been made,¹⁹⁸ but the idea has not been widely accepted by American labor unions.

The problem then, is how to implement codetermination in those industries where labor is receptive to the idea while not imposing it upon both management and unions who do not want it. In keeping with U.S. labor law tradition, employee codetermination could be made simply one more subject of collective bargaining.¹⁹⁹ To prevent stonewalling by management, § 8(d) of the NLRA²⁰⁰ would be amended²⁰¹ to require that employee representation on the board of directors be a mandatory subject of bargaining.²⁰² An amendment to § 8(a)(2)²⁰³ might be necessary to prevent a charge of employer interference with or domination of the labor organization involved.²⁰⁴

197. See Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 Harv. L. Rev. 1394, 1417-18 (1971).

198. See Blumberg, *Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public" Directors*, 53 B.U.L. REV. 547, 566 (1973); Stokes, *More Worker Power*, N.Y. Times, Jan. 23, 1979, § A, at 19, col. 1 [hereinafter cited as Stokes]; N.Y. Times, May 13, 1976, at 51, col. 8.

199. See Note, *Employee Codetermination*, *supra* note 18, at 987-1009.

200. 29 U.S.C. § 158(d) (1976).

201. After the amendment, § 8(d) could read:

to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable time and confer in good faith with respect to wages, hours, *employee representation in the management of the enterprise of the employer*, and other terms and conditions of employment. . . .

Id. (suggested amendment emphasized).

202. Accord Note, *Employee Codetermination*, *supra* note 18, at 1008.

203. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1976) provides that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

204. Codetermined boards arguably could be classified as labor organizations under NLRA §

This voluntaristic approach seems well suited to American industrial relations. It allows labor and management to assess codetermination in context with other economic demands made during collective bargaining. Since the law would merely require bargaining about employee representation in management, the parties themselves decide whether or not codetermination is necessary. The normal principles and strategies of collective bargaining would then determine whether or not codetermination would be implemented.²⁰⁵

The mandatory nature of the obligation to bargain is of critical importance. Without such a duty, management retains an ultimate veto over employee attempts to influence certain corporate decisions which affect them. This is the fatal defect of a recent suggestion²⁰⁶ that, in place of employee codetermination, management be required only to "meet and discuss" with labor about certain decisions which it is not presently obligated to do.²⁰⁷ By equating codetermination with "wages, hours, and other terms and conditions of

2(5), 29 U.S.C. § 152(5) (1976). See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). If a court found employer domination of the board, an unfair labor practice finding would be made. But, it has been suggested that recent cases support the view that courts would not invalidate codetermined boards under § 8(a)(2). Note, *Employee Codetermination*, *supra* note 18, at 1001; see *Modern Plastics v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967); *Coppus Engineering v. NLRB*, 240 F.2d 564, 572-73 (1st Cir. 1956); see also Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 519-32 (1972-1973); Wulff, *The West German Model of Codetermination Under Section 8(a)(2) of the NLRA*, 31 IND. L.J. 795 (1976).

Because American courts have never had occasion to rule on the issue such speculation is risky. To avoid an adverse determination, § 8(a)(2) should be amended to provide that codetermined boards are without its proscription.

205. Bruce Stokes of the Worldwatch Institute recently commented on the adoption of codetermination through collective bargaining in the United States. Writing in *The New York Times*, he noted that labor should seriously consider codetermination as a contract term because "[a] seat on the board of directors . . . may ultimately prove more valuable to workers and to unions than a paycheck that is fatter by yet another 1 percent." Stokes, *supra* note 198, at col. 1. Management as well should look favorably on codetermination because, as Stokes points out: "Recent surveys show that both productivity and the quality of work life improve and that worker-related drags on economic performance — absenteeism, turnover and strikes — diminish when employees assume new responsibilities." *Id.* at col. 3.

Commenting on employee codetermination in West Germany, James Furlong states that "experience has shown that the worst fears about the system haven't materialized. The common interest of workers and shareholders in a healthy company has proven more important than their differences." Furlong, *supra* note 32. This experience in Germany should be instructive to labor and management in the U.S. when considering whether to adopt codetermination during collective bargaining.

206. Kujawa, *supra* note 1, at 964-67.

207. Management must discuss with labor decisions relating to certain reductions of unit employment, see, e.g., *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (subcontracting), but not about other matters as to which management makes the final decision. See, e.g., Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 401 (1950). Since any "meet and discuss" requirement necessarily involves matters as to which management makes the final decision, if no change is made which requires a cooperative decision-making effort, then management retains the power to make the ultimate decision and can effectively ignore labor's suggestions and protestations.

employment," Congress would be giving it the character necessary to effect a true change in the bargaining power imbalance that now exists.

Codetermination in and of itself is not the solution to the problem. It is merely an addendum to collective bargaining in areas where traditional dispute resolution is not fully effective.²⁰⁸ Further changes in the NLRA are needed.

The recent decisions of the Supreme Court and the NLRB which severely restrict the extraterritorial reach of the U.S. labor laws²⁰⁹ could be overruled by a simple declaration of Congress that it intends to expand the scope of "commerce"²¹⁰ to its constitutional limit,²¹¹ just as is the case with the Sherman Act.²¹² Such a declaration would subject activity which has substantial effects on unit employees but is presently unregulated²¹³ to Board jurisdiction. This would remove the dual threats that even "innocuous activity" of an American labor organization which has an extraterritorial economic effect, and activity which may have an effect on foreign relations, will not be subject to the checks and balances of U.S. labor laws.²¹⁴

In contrast, an area of MNE-labor relations which should be *deregulated* to some extent is the secondary boycott. The Board's present single enterprise and ally doctrines²¹⁵ unduly restrict labor action which attempts to pressure the MNE by concerted activity against its various components. A change by Congress of NLRA § 8(b)(4)(B),²¹⁶ to include therein an "economic realities" test,²¹⁷ would remove the artificial barrier to effective union action against the multinational. The concomitant rise in labor power will reduce the bargaining strength imbalance now existing.

208. Note *Employee Codetermination*, *supra* note 18, at 995.

209. See § IV.B.2, 3 *supra*.

210. NLRA § 2(6), 29 U.S.C. § 152(6) (1976); LMRA § 501, 29 U.S.C. § 142(3) (1976).

211. The Supreme Court in *American Radio Ass'n, AFL-CIO v. Mobile Steamship Ass'n, Inc.*, 419 U.S. 215, 224 (1974), and *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*, 415 U.S. 104, 114 (1974), refused to bring activity which was clearly within the constitutional power of Congress to regulate within the scope of commerce as set out in the labor laws. The NLRB in *RCA OMS, Inc.*, 202 N.L.R.B. 228, 228 (1973) and *Contract Services, Inc.*, 202 N.L.R.B. 862, 865 (1973), developed a *per se* exclusion rule and an "effect on foreign relations" doctrine to find no jurisdiction and to decline jurisdiction respectively, relying in part upon the scope of commerce under the NLRA. In both cases, the activities involved were clearly within the reach of the Commerce Clause of the Constitution.

212. See note 160 *supra*.

213. For example, as was noted in dissent by Justice Brennan, the majority in *Windward* "effectively deprives American seamen . . . of any federally protected weapon with which to try to save their jobs." *Windward Shipping (London) Ltd. v. American Radio Ass'n, AFL-CIO*, 415 U.S. 104, 116 (1974) (Brennan, J., dissenting). Since the rationale of *Windward* and the later *Mobile Steamship* is not limited to maritime issues alone, Brennan's observation applies with as much force to analogous situations involving MNEs and their American employees.

214. See § IV.B.3 *supra*.

215. See note 88 *supra* and accompanying text and notes 175-77 *supra* and accompanying text.

216. 29 U.S.C. § 158(b)(4)(B) (1976).

217. See note 92 *supra* and accompanying text.

No single one of the suggested amendments to the NLRA would be sufficient to provide a national labor union with the power necessary to countervail that of transnational capital. However, the implementation of the combination thereof magnifies the effect of each so that labor and management would face each other as relative equals. The resultant balance of power would promote concessions by both sides to their mutual advantage and to the advantage of U.S. commerce.²¹⁸

VI. CONCLUSION

The purpose of this Comment has been to examine various solutions to the problem of union-MNE bargaining power imbalance. The system of codetermination in Europe appears to be a partial answer. But the history and system of labor relations in the United States are unlike those of Western Europe. Consequently, while the experiences of Germany and Sweden can be drawn upon, it is necessary to shape those experiences to fit the U.S. context. Since United States labor law is procedure-oriented, changes in procedure may represent the solution to the problem. Several such reforms have been suggested as a solution to the problems that exist because of the inability of U.S. labor to achieve an equal bargaining position with multinational enterprises.

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218. See *Findings and declaration of policy*, NLRA § 1, 29 U.S.C. § 151 (1976).